In the Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES AND COURT RULES

TEXT

All emphasis is ours unless otherwise indicated.

References to the Record are indicated by the letter "R" followed by the corresponding page number.

References to the Petition for a Writ of Certiorari are indicated by the word "Petition" followed by the appropriate page therein.

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I.

Pursuant to Supreme Court Rule 40(3), respondent Pacific Westbound Conference (PWC) omits matters adequately covered in sections I, II, and IV of the Petition and in the appendices thereto.

II.

STATEMENT OF THE CASE

Respondent PWC agrees that petitioner's statement of the case is in most respects correct. Respondent does take exception to important aspects of that statement, however, and accordingly offers the following statement of the case.

A. Proceeding Below

Petitioner (plaintiff below) commenced this action on December 5, 1963 by filing its complaint under the Antitrust Acts[1] in the United States District Court for the Northern District of California, Southern Division, against PWC and the Far East Conference (FEC) (R. 6-22).

On March 1, 1963 a motion was filed on behalf of the Pacific Westbound Conference, its Chairman, and its members individually, to dismiss the action on the ground that the District Court was without jurisdiction to proceed as the matter was and is subject to the exclusive primary jurisdiction of the Federal Maritime Commission (R. 28-31). A similar motion was filed on behalf of the Far East Conference, its members and former members (R. 23-27), and by the Federal Maritime Commission which additionally moved for leave to intervene in the proceeding (R. 32-35). All motions were supported by lengthy memoranda on points and authorities. By order of April 30, 1963, the Court granted the motion of the Federal Maritime Commission to intervene and requested further argument on the question of whether the Shipping Act, 1916[2] provides a

1. Jurisdiction of the District Court was alleged under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, Section 4 of the Clayton Act, 15 U.S.C. § 15, and Sections 1331, as amended, and 1337 of the Judicial Code, 28 U.S.C. §§ 1331, 1337).

2. 46 U.S.C. §§ 801, *et seq.*

remedy to appellant (R. 61-62). Supplemental memoranda were filed by all parties and on June 11, 1963, further argument was held.

On June 21, 1963, in a Memorandum of Opinion the District Court concluded that petitioner's complaint tendered the issue whether the defendant carriers (respondents) had carried out a rate agreement prior to approval by the Commission in violation of Section 15 of the Shipping Act, that the Act provides a remedy for any violation thereof, and that the Supreme Court has held that the antitrust laws are superseded to the extent that the Shipping Act provides a remedy, citing: *"United States Navigation Co. v. Cunard,* 284 U.S. 474 (1931); *Far East Conference v. United States,* 342 U.S. 570 (1951); See also *American Union Transport v. River Plate,* 126 F. Supp. 91 (S.D. N.Y., 1954), aff'd 222 F.2d 369 (2d Cir. 1955); *Rivoli v. New York,* 167 F. Supp. 940, 943 (S.D. N.Y., 1956); *United States v. Alaska S.S. Co.,* 110 F. Supp. 104 (W.D. Wash. 1952)." (R. 63-64)

Petitioner appealed to the Court of Appeals for the Ninth Circuit (R. 67). That Court affirmed the judgment below and denied a petition for rehearing (R. 92-120, 122-24).

B. Facts

We adopt that part of petitioner's statement (Petition pp. 10, 11) which says:

> "Carnation Company, was a shipper of evaporated milk from the Pacific Coast to the Philippine Islands by defendant common carriers, members of defendant Pacific Westbound Conference (PWC) (R. 9, 10, 21).
>
> Defendant common carriers to the Far East (R. 9, 10-13) fell into 3 groups, (1) those operating only from Pacific Coast ports (R. 10-11), (2) those operating only from the Atlantic Coast and/or Gulf of Mexico ports (R. 11), and (3) those operating both from Atlantic Coast and/or Gulf ports and from Pacific Coast ports

(R. 11-13). Those operating from Pacific Coast ports were the only carriers providing general cargo and regular berth service on substantially regular routes and with regular sailings and were the only carriers by whom the plaintiff could ship to Manila (R. 14, 21).

Before January 1953 the carriers from Pacific ports associated themselves under Pacific Westbound Conference Agreement No. 57 to form the Pacific Westbound Conference for the purpose, among other things, of fixing the rates at which Conference members would serve the trade. Agreement No. 57 provided *that PWC should fix the rates.* The Agreement was filed with, and approved by, the United States Shipping Board under Shipping Act, 1916, § 15 (46 U.S.C. § 814). Thereafter those rates were fixed by PWC, except as stated below. Only carriers operating from Pacific Coast ports were members of PWC (R. 13-14). No carrier operating only from Pacific Coast ports was a member of the Far East Conference (FEC) (R. 14).

Before January 1953 the carriers from the Atlantic and Gulf ports to the Far East formed the Far East Conference (FEC) for the purpose, among other things, of fixing rates to be charged by its members. Only carriers operating from Atlantic or Gulf ports were members of FEC. No carrier operating from only Atlantic and/or Gulf ports was a member of PWC (R. 14-15).

Carriers operating from Atlantic or Gulf ports and Pacific ports were members of both Conferences (R. 13-15).

Trade from the Atlantic and Gulf to the Far East was competitive with that from the Pacific Coast. PWC and FEC served different trades that were competitive and their services were competitive except as restrained as stated below (R. 15)" (emphasis as in original; ref. to Complaint converted to Record ref.)

The balance of petitioner's factual statement requires, in our view, different emphasis. In November 1952, mem-

rs of the Pacific Westbound Conference (PWC) and Far ast Conference (FEC) agreed in writing to "establish e rates to be charged for the transportation of commodi-es, and the rules and regulations governing the applica-on of said rates . . ." The rates were to be established by he parties" and not by the conferences separately (R. 48).

The agreement further provided for an "initial meeting" the parties to carry out the approved basic agreement. he initial meeting, it was provided, "shall make rules, not consistent with the provisions of this agreement, for the nduct of all meetings to be held hereunder, and for the ansaction of such other business as the parties may be ermitted to conduct by virtue hereof, including *the pro-ision of the machinery for the change of any rates, rules regulations* adopted at the initial meeting or at any ubsequent meeting." (R. 48)

The agreement further provided for the right of inde-endent action by either party (R. 49).[3]

This joint agreement, known as Agreement 8200, was filed ith and approved by the Federal Maritime Board[4] (R. 47) nd thereby exempted specifically by statute from the oper-tion of the antitrust laws. (Shipping Act, 1916 § 15; 46 .S.C. § 814)

The agreements described in petitioner's complaint were llegedly entered at the initial meeting in January, 1963 rovided for in Agreement 8200 (R. 16-17).

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3. This provision provides an escape valve by which conferences an proceed independently if there is no concurrence pursuant to he agreement and it is to the best interest of that conference to ct independently.

4. Now the Federal Maritime Commission; hereinafter, the Com-ission's predecessor agencies, including the Federal Maritime Board, the United States Maritime Commission, and the United States Shipping Board are referred to as the Federal Maritime Commission, or "the Commission."

In 1959 the Federal Maritime Commission instituted an investigation "to determine whether said Agreement No. 8200 is a true and complete agreement of the parties within the meaning of said Section 15 and whether it is being carried out in a manner which makes it unjustly discriminatory or unfair." On September 8, 1960, petitioner was granted leave to intervene in that proceeding. That proceeding was designated Docket 872 (R. 40-41, see R. 38-56).[5]

As the Court of Appeals stated: "The issues presented at this hearing by Carnation and others included in general the same matters and claims set forth in Carnation's complaint in this case" (R. 95-96). Those "same matters and claims" were, as alleged by petitioner in its complaint:

1. Defendants [respondents] illegally conspired and agreed to restrain foreign commerce (R. 16).
2. Defendants illegally conspired and agreed to fix rates (R. 16).
3. Defendants illegally conspired and agreed not to disclose to any shipper information regarding rate changes and/or the position of either Conference or of any member of either Conference regarding rate requests (R. 16-17).
4. Defendants illegally conspired and agreed that PWC would pretend to set and apply rates which had been jointly agreed upon (R. 17).
5. Defendants illegally conspired and agreed that PWC would make no changes in rates agreed to without the concurrence of the FEC except rates on the PWC initiative list (R. 17).
6. Defendants illegally conspired and agreed to establish a "list of initiative items" which would permit the Conference with the initiative to set rates with-

5. The Order instituting Docket 872 as well as other information concerning it is contained in the Lisi Affidavit and attachments (R. 38-56). The proceeding is described in inadvertent error by petitioner as "certain proceedings before the Federal Trade [sic] Commission". (Petition, p. 10).

out the concurrence of the other Conference. The list of initiative items did not include evaporated milk until May 1961 (R. 17-18).

7. Defendants PWC and FEC illegally conspired and agreed that the rate for evaporated milk from Pacific Coast ports to the Philippine Islands should be increased by $2.50 per ton (R. 18-19).

8. Defendant PWC, "pretending to act agreeably to the provisions of said Agreement No. 57", illegally conspired and agreed to state and circulate the $2.50 increase (R. 19).

9. Defendant PWC pursuant to its alleged agreements with the FEC in fact announced, circulated and charged a rate for evaporated milk increased by $2.50 (R. 19).

10. Defendant PWC because of its alleged agreement with the FEC not to grant a reduction unless the FEC concurred, refused to grant a reduction of $2.50 per ton requested by Carnation in the rate for evaporated milk (R. 20).

III.

QUESTION PRESENTED AND SUMMARY OF POSITION

Petitioner's complaint in the District Court stated violations of the Shipping Act, 1916 (46 U.S.C. § 801 *et seq.*). The complaint also stated a claim for treble damages under the antitrust laws, absent the regulatory scheme pertaining to the shipping industry under the Shipping Act, 1916. The Court of Appeals affirmed the District Court's dismissal of the complaint on the doctrine of supersession and exclusive primary jurisdiction as enunciated in *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L.ed. 408 (1932) and *Far East Conference v. United States*, 342 U.S. 570, 96 L.ed. 576 (1952). The opinion of the Court of Appeals demonstrates that its decision was based on the ground that governed the *Cunard* and *Far East* cases,

namely, the Shipping Act, 1916 provides the exclusive remedy for the wrongs alleged in the complaint and the Federal Maritime Commission has the primary jurisdiction[6] to decide the matter.

The Petition in questioning the decision of the District Court and the Court of Appeals presents the question whether that principle becomes inapplicable if the complaint is for treble damages rather than for an injunction.[7]

None of the "special and important reasons" why the Court should grant certiorari which are suggested in Supreme Court Rule 19 exist here.

There is no contention in the Petition that the Court of Appeals decided this question in conflict with the decision of another Court of Appeals.[8] Since the Court of Appeals expressly followed the cases of *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L.ed. 408 (1932) and *Far East Conference v. United States*, 342 U.S. 570, 96 L.ed. 576 (1952) and applied the ruling in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 9 L.ed. 2d 325 (1963) which are the three principal cases dealing with the issues involved, there can be no assertion that the Court of Appeals decided a federal question in conflict with applicable decisions of this Court. Rather, the thrust of the petition is to comb the facts of those decisions in search

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6. The term is somewhat misleading. Under the doctrine the Commission has exclusive original jurisdiction subject to appeal to the Courts.

7. Petitioner's statement of questions also raises the question of a right to trial by jury. Nowhere does the Petition discuss this issue. Indeed, it was settled as long ago as 1907 in *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553 and *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 67 L.ed. 183 (1922).

8. Indeed, the instant case was decided exactly the same as a decision in the Second Circuit presenting identical questions. (*American Union Transp. v. River Plate & Brazil Conferences*, 222 F.2d 369 (2d Cir. 1955) affirming on opinion below in 126 F. Supp. 91 (S.D.N.Y. 1954).

of possible distinctions between the ruling cases and the case at bar. These minute distinctions are thereafter presented as if they constituted important questions of federal law that have not been but should be decided by this Court. There are, however, no new or important issues presented by the instant case. The question has been thoroughly considered and carefully answered by the Court on numerous occasions and particularly in the three cases cited above.

The *Cunard* and *Far East* cases held that a complaint seeking an injunction under the Sherman Act against an agreement allegedly unfiled under Section 15 of the Shipping Act (46 U.S.C. § 814) should be dismissed because "the Shipping Act covers the dominant facts alleged in the present case as constituting a violation of the Anti-trust Act"[9] and "the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws".[10] Petitioner seeks to distinguish these cases on the ground that the instant action sought treble damages rather than an injunction and that accordingly 1) *Cunard* and *Far East* involved prospective relief rather than relief looking to past acts, and 2) *Cunard* and *Far East* are inapplicable because the Shipping Act does not grant remedies yielding a dollar recovery equal to a treble damage recovery while administrative powers are deemed equivalent to an injunctive remedy.

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9. *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 483; 76 L.ed. 408, 413 (1932). A similar holding as regards unapproved practices under the Federal Aviation Act may be found in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 9 L.ed. 2d 325 (1963).

10. *Ibid* at 485, 76 L.ed. at 414, quoted as governing principle in *Far East Conference v. United States*, 342 U.S. 570, 574, 96 L.ed. 576, 582 (1952).

Respondents reply that a suit for treble damages under the antitrust laws falls squarely within the rule of *Cunard* and *Far East;* that holdings of the Supreme Court and lower courts in other cases make this clear; that the Shipping Act provides penalties and remedies comparable to a treble damage recovery; and that the policy of the statutes in question and of the primary jurisdiction doctrine require the result reached by the District Court and the Court of Appeals.

Petitioner further asserts that the doctrine of primary jurisdiction is inapplicable because there are no questions for the administrative agency to decide. Respondents point out to the contrary that the administrative agency must decide such matters as: (1) whether the alleged agreements were in fact made, (2) to what extent may parties implement an approved agreement without requiring further agency approval, (3) whether or not the alleged agreements fall within the scope of an already approved agreement filed with the Commission, (4) whether the Shipping Act, 1916 was otherwise violated, (5) assuming the agreement violated the Act because unfiled and unapproved, should the Commission now approve the agreement as it stands or as modified, and (6) assuming a violation, the extent of reparations, if any, to be awarded.

IV.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

The purpose of the doctrine of exclusive primary jurisdiction is to accommodate conflicting statutory schemes: here the proscription of limitations on competition contained in the antitrust laws and the encouragement of such limitations under governmental supervision pursuant to the Shipping Act, 1916.[11] The doctrine

11. 46 U.S.C. § 801 *et seq.* Citations to the Shipping Act, 1916 herein are to the Act as it stood at the time the matters giving rise

"is designed . . . to assure that the substantive exemptions from the antitrust laws created by Congress or required by the logic and structure of the regulatory scheme are not destroyed through by-passing the forum chiefly concerned with the regulation of the industry in question." (von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 Harv. L. Rev. 929, 932 (1954)).

A. The Cunard and Far East Cases Hold That the Antitrust Laws Are Inapplicable to Agreements Subject to Section 15 of the Shipping Act.

As the Court of Appeals stated, the agreements alleged in the instant treble damage complaint as violations of the antitrust laws were also agreements subject to Section 15 of the Shipping Act.[12] This section requires that such agree-

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to the complaint allegedly transpired. The amendments by P.L. 87-346, Oct. 3, 1961 are omitted.

12. R. 95-96. Section 15 reads:

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to

ments be filed with and approved by the Federal Maritime Commission. If approved, they are expressly exempted from the antitrust laws. If unapproved or unfiled the parties thereto are subjected to specific penalties, and injured persons are entitled, under Section 22 of the Shipping Act (46 U.S.C. § 821), to reparations for losses suffered.

The *Cunard* and *Far East* cases hold that there can be no injunctive relief under the antitrust laws against agreements subject to Section 15 of the Shipping Act and allegedly unfiled under that section because the remedies of the Act supersede the antitrust laws. (*United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 485-86, 76 L.ed. 408, 414-15 (1932) followed in *Far East Conference v. United States*, 342 U.S. 570, 573-74, 96 L.ed. 576, 581-82 (1952)). The Court has never questioned the holdings of these cases[13] and as recently as 1963 the Court reaffirmed their

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the detriment of the commerce of the United States, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the Board shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

13. Petitioner has contended throughout this case that *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 2 L.ed. 2d 926 (1958) in some way limits the holdings of the *Cunard* and *Far East* cases. (See *e.g.* Petition pp. 34-36, 39). The Court in

principle and cited them in its support. (*Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 313 n. 19, 9 L.ed. 2d 325, 337 (1963)).

The reasoning in these cases had no special relevance to the fact that the antitrust remedy sought was an injunction. Supreme Court cases decided both before and after *Cunard* and holdings by the lower federal courts compel the conclusion that there is no distinction between injunctive and treble damage relief for purposes of either the supersession of remedies doctrine or primary jurisdiction.[14] Because petitioner so vigorously urges this as a distinction, however, and because it is the only ground on which *Cunard* and *Far East* at all differ from this case, we feel it is important to discuss the matter in detail.

The Court in *Keogh v. Chicago & N.W. Ry.,* (260 U.S. 156, 67 L.ed. 183 (1922)), concluded that the remedy for injury resulting from unreasonably high rail rates set by

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Isbrandtsen held that dual rate contracts similar to those involved in *Far East* and *Cunard* violated Section 14 Third of the Shipping Act (46 U.S.C. § 812) and hence could not be approved under Section 15. There was no suggestion in *Isbrandtsen* that the antitrust laws were applicable to this Shipping Act question, and the Court discussed the *Far East* case solely on the question of legality under Section 14 Third of dual rate contract systems. As the Court of Appeals in the instant case stated regarding petitioner's *Isbrandtsen* argument, "We think that appellants' effort to assert the lack of continuing authority of Cunard and Far East is entirely fallacious and altogether unsupportable." (R. 103). The Court then supports this statement in footnote 12 which gives a clear explanation of petitioner's argument and the reasons why it is "entirely fallacious."

14. Unless it be that supersession is *less* likely to be found if the prayer is for an injunction. In *Georgia v. Pennsylvania R.R.,* 324 U.S. 439, 89 L.ed. 1051 (1945) the Supreme Court held that an alleged rail rate conspiracy could be enjoined but affirmed dismissal of the treble damage complaint. The author of that opinion has stated that it would probably be decided differently as to the injunctive aspect of the complaint under present laws. (See *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 306 n. 11; 9 L.ed. 325, 333 (1963)).

an alleged illegal conspiracy is that contained in the Interstate Commerce Act rather than a damage action under the antitrust laws. The Court stressed the need to maintain a uniform rate structure and equality of treatment of different shippers.[15]

Thus, when the *Cunard* case was brought some years later, it was already established that administrative remedies prevailed as to damage actions. The complaint in *Cunard* sought only an injunction which was not, strictly speaking, a remedy that the administrative agency could grant. Nonetheless, the Shipping Act remedy was deemed exclusive.

The later cases of *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500, 80 L.ed. 827 (1936) and *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 89 L.ed. 1051 (1945) further stress that treble damage actions may not be brought where the administrative scheme provides a remedy. The *Terminal Warehouse* case specifically states that this principle is applicable to the Shipping Act, citing the *Cunard* case (297 U.S. at 514-15, 80 L.ed. at 835-36):

> "Certain then it is that the Anti-Trust Laws are inapplicable in all their apparent breadth to carriers by rail or *water*. A consignor or consignee aggrieved by such a wrong must resort to the appropriate administrative agency, at least for many purposes. If he is remitted to the Commerce Act or the Shipping Act to cancel the illegal preference, may he pass over those acts and revert to the Clayton or the Sherman Act for the purpose of recovering damages? The Commerce

15. The *Keogh* case, a treble damage action, was cited in the 1963 *Pan American* decision, (371 U.S. at 310, 9 L.ed. 2d at 335-36) for the proposition that a regulatory scheme "leaves . . . all questions of *injunctive* relief against" certain anti-competitive practices to the administrative body. Thus, the Supreme Court indicated that treble damage actions present identical questions of supersession.

> Act *like the Shipping Act embodies a remedial system that is complete and self-contained.* It provides the means for ascertaining the existence of a preference, but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces it prescribes a fitting remedy which, we think, was meant to be exclusive. If another remedy is sought under cover of another statute, there must be a showing of another wrong, not canceled or redressed by the recovery of damages for the wrong explicitly denounced. The opinions of this court in their fair and natural extension point to that conclusion."

The lower federal courts have held that the rule of the *Cunard* and *Far East* cases applies to treble damage actions. *American Union Transp. v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D. N.Y. 1954), *aff'd* on opinion below, 222 F.2d 369 (2d Cir. 1955) is precisely in point. A treble damage action alleging a conspiracy by carrier members of a steamship conference was dismissed on the ground that the allegation of an agreement unfiled with and unapproved by the Federal Maritime Board constituted a Shipping Act question for the regulatory agency. The same attempt to distinguish *Cunard* and *Far East* on the basis that they involved injunctive actions was rejected, the Court holding that those cases compelled the dismissal.[16]

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16. In reliance upon *Cunard* the District Court said:
"Therefore, assuming the illegality of the procedure of effectuating an unfiled and unapproved agreement, it remains for the board to determine the substantive questions raised by the agreement under the Shipping Act, and the remedy of the complaining party for substantive violations remains under the Shipping Act. The language of the Supreme Court

A number of other cases in following the Supreme Court reach the same result.[17]

Cunard and *Far East* also dispose of the contention that since only approved agreements are expressly exempted by Section 15, unapproved agreements are not. Since petitioner persists in this position (Petition pp. 22-24) it is well to emphasize the reasons why it has been rejected by the Court. Even a superficial reading of Section 15 discloses that Congress provided two distinct functions under that provision: (1) Approval of agreements falling within the first paragraph of Section 15 and (2) Policing and penalties for those who carry out such agreements before approval or after disapproval. Thus, the second paragraph of Section 15 gives the Commission power to "disapprove, cancel, or modify any agreement . . . *whether or not previously approved by it;*" the fourth paragraph provides that "before approval, or after disapproval, *it shall be unlawful to carry out*" any agreement; and the final paragraph subjects the parties who violate the prohibitions of the fourth paragraph to a penalty of $1000 *per day.*

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in the United States Navigation case precludes the consideration of the factual distinction urged by the plaintiff."

Referring to *Far East*, the court concluded:

"the clear language of the Supreme Court authoritatively compels the decision." (126 F. Supp. at 93).

The Second Circuit (Clark, Medina and Dimock, J.J.) was so satisfied with the District Court's view of the holding of *Cunard* and *Far East* that it unanimously "Affirmed on the opinion of District Judge Edelstein. . . ." (222 F.2d at 370).

17. *Rivoli Trucking Corp. v. New York Shipping Ass'n.*, 167 F. Supp. 940 (S.D. N.Y. 1956); *Rivoli Trucking Corp. v. New York Shipping Ass'n.*, 167 F. Supp. 943 (S.D. N.Y. 1957); *United States v. Alaska S.S. Co.*, 110 F. Supp. 104 (W.D. Wash. 1952). See *Swayne & Hoyt v. Kerr Gifford & Co.*, 14 F. Supp. 805 (E.D. La., 1935); *Wisconsin & Mich. Transp. Co. v. Pere Marquette L.S.*, 67 F.2d 937 (7th Cir. 1933); *United States v. Borax Consolidated Ltd.*, 141 F. Supp. 396 (N.D. Cal. 1955).

If it were intended that Section 15 agreements be exempted from the antitrust acts only if approved, the enforcement provisions of Section 15 would be meaningless. There would have been no necessity to include a provision in Section 15 making the carrying out of unapproved agreements unlawful. If approval were not sought and obtained under the Shipping Act, the penalties and remedies already provided by Congress under the antitrust acts for the unapproved and, hence, illegal agreement would pertain.

The fact that the Act does contain penalty provisions relating to unapproved agreements demonstrates that Congress did not desire to treat the matter piecemeal leaving the function of approval to the Commission but dealing with the enforcement problem either administratively *or* under the antitrust acts depending on whether the Commission or a private litigant were the more fleet of foot. Since by the time the Shipping Act was passed the doctrine of primary jurisdiction and supersession of remedies was firmly established,[18] it was not necessary for Congress to provide express exemption from the then existing antitrust acts for acting under unapproved Section 15-type agreements.

By contrast it *was* necessary to include an exemption *after* approval because once the agreement is approved, it no longer constitutes a violation of the Shipping Act and there is, accordingly, no penalty or remedy provided which would supersede the penalties or remedies of the antitrust acts. There would be a conflict between the approved agreement which is not in violation of the Shipping Act and the antitrust laws of which it would still constitute a violation. As a consequence, in order to avoid the very problem of

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18. See *e.g.*, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553 (1907) and cases cited in von Mehren, *supra*, p. 11 at 935, nn. 23 and 27.

accommodation which petitioner raises, it was necessary to include the specific exemption for approved agreements.

B. Congress Subjected Persons Violating the Shipping Act to the Act's Sanctions, Not to Parallel Treble Damage Actions.

Petitioner correctly characterizes the treble damage remedy under the antitrust laws as including both compensatory and punitive elements. The compensatory one-third is designed to make the plaintiff whole while the punitive two-thirds is designed to discourage violations of the law by defendant and to encourage plaintiffs to bring such actions.[19] The penalties and remedies provided in place of such recovery by the Shipping Act follow a very similar pattern.

The private remedy provisions of the Shipping Act offer strong evidence of Congressional intention to supersede the application of antitrust remedies with respect to matters covered by the Act. Violation of Section 15 of the Shipping Act by reason of the carrying out of an unfiled and unapproved Section 15-type agreement gives an injured party a right to reparations under Section 22 to the extent that he can prove damages. This is so even though the Commission would have approved the agreement had it been filed.[20] Petitioner, while alleging violation of Section 15 of

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19. See Petition, p. 15. Notably, the punitive two-thirds of such a recovery is taxable as ordinary income rather than as a tax-free return of capital (*Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 99 L.ed. 483 (1955)).

20. See *American Union Transp., Inc. v. River Plate & Brazil Conferences*, 5 F.M.B. 216 (1957) *aff'd sub nom.; American Union Transp. v. United States*, 257 F.2d 607 (D.C. Cir. 1958); *Swift & Co. v. Gulf & So. Atl. Havana Conference*, 6 F.M.B. 215; *rev'd sub nom.; Swift & Co. v. Federal Maritime Comm'n.*, 306 F.2d 277 (D.C. Cir. 1962), see 7 F.M.C. 431 (1962) (Settlement agreement on reparations); *Kempner v. Federal Maritime Comm'n*, 313 F.2d 582 (D.C. Cir. 1963). If the Commission orders reparations, the order may be enforced in a District Court and attorneys' fees and costs recovered (Shipping Act, 1916, § 30, 46 U.S.C. § 829).

the Shipping Act (R. 16-18), for reasons known to it determined not to pursue its administrative remedy, but to seek treble damages under the antitrust acts. (See Petition, p. 19, n. 30).

As stated by Judge Augustus Hand for the Second Circuit in the *Cunard* case:

> "It is difficult to suppose that Congress ever intended to give private parties two sets of remedies, under each of which reparation as well as other relief might be had, and still harder to imagine that these remedies might be pursued pari passu.
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> • • •
>
> "No doubt, if the allegations in the amended bill are found to be correct, the Anti-Trust Acts have been violated, but the Shipping Act has been violated as well. Though the remedies under the Anti-Trust Acts are thought by plaintiff's counsel to apply, it does not follow that they do, where the frame of the Shipping Act indicates another procedure. We find that all the wrongs alleged are violations of the Shipping Act, and hold that the plaintiff must seek its remedy thereunder." (*United States Nav. Co. v. Cunard S.S. Co.*, 50 F.2d 83, 90 (2d Cir. 1931).

Petitioner's assertion that it is entitled to seek treble damages unless an *equal* amount would be recoverable under the Shipping Act assumes that antitrust remedies are only superseded if exactly equivalent remedies are provided. Although the Shipping Act penalties and reparations are roughly comparable to the punitive and remedial portions of antitrust recoveries, petitioner's assertion is incorrect. Supersession of the antitrust laws by another statutory scheme does not operate only if it secures the remedy most financially favorable to plaintiffs; nor is an antitrust treble damage remedy a constitutional right which cannot be taken

away by a different statutory provision. Supersession merely reconciles conflicting statutory patterns such as the Shipping Act and the antitrust laws, by giving effect to Congressional intent under the regulatory statute.

Under Section 15 of the Shipping Act, Congress amply provided the deterrent and took care of the punitive factor by setting the severe penalty of $1,000 per day for each day of violation. Further, Congress provided that punitive aspects of Shipping Act sanctions should be penalties payable to the United States rather than to the injured party under the Act. Reparations under Section 22 were to be handled administratively,[21] doubtless to insure that all shippers would obtain like reparations without discrimination and would not obtain what, in effect, would be rebates in the form of punitive damages. The heart of the Shipping Act is prevention of discrimination and preference between shippers similarly situated. Treble damage recoveries would upset this basic regulatory purpose and disturb uniformity by offering through the vagaries of jury verdicts the opportunity for windfalls to some shippers and no recovery or less recovery to others. The Court of Appeals astutely analyzed the situation when it stated:

> "To permit the maintenance of an action such as this would in our view produce for the shipping industry confusion worse confounded, destroy uniformity of interpretation and enforcement of the Shipping Act, and bring about the very type of discrimination which that Act was designed to avoid. We may assume that Carnation is not the only shipper who dislikes the rates fixed for shipment of its product. Carnation might win its suit and another similar concern, making a similar claim, might lose." (R. 111).

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21. The Shipping Act, unlike the Interstate Commerce Act, contains no saving clause preserving other remedies. (See Interstate Commerce Act § 22, 49 U.S.C. § 22).

This points up the converse of petitioner's persistent argument that while supersession and primary jurisdiction may be applicable to injunctive proceedings (as in the *Cunard* and *Far East* cases) they are not to damages for past actions. An injunction would in fact be less disruptive than to allow a treble damage suit because an injunction would but nullify the carriers' agreement *in futuro* enabling them to make a new agreement that did satisfy the Shipping Act whereas, as stated above, award of treble damages would create discrimination as to past acts.

C. The Wrongs Charged in Petitioner's Complaint as Antitrust Violations Are Precise Ingredients of the Federal Maritime Commission's Authority Under the Shipping Act.

Cunard particularly emphasized the following test for granting a motion to dismiss on grounds that a complaint charges violation of a regulatory statute:

> "*A comparison of the enumeration of wrongs charged in the bill with the provisions* of the sections *of the Shipping Act* above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws." (*United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 485, 76 L.ed. 408, 414).

This test was followed in *Far East Conference v. United States*, 342 U.S. 570, 574; 96 L.ed. 576, 582 (1952).[22]

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22. The *Far East* and *Cunard* cases applied this principle despite the fact that: (1) It was apparent that the agreements alleged had not been filed and approved; (2) The agreements, the Supreme Court later held, could not be approved by the Commission. (*Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 2

More recently, the Court has paraphrased the test in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 305, 9 L.ed. 2d 325, 333 (1963) as follows:

> "The acts charged in this civil suit as anti-trust violations are *precise ingredients* of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers."[23]

The wrongs that petitioner charges in its complaint may be summarized:

(1) An agreement to restrain foreign commerce (R. 16).

(2) An agreement to fix rates (R. 16).

L.ed. 2d 926 (1958)). Thus, the instant facts present an even clearer case than did *Cunard* and *Far East*. The *Pan American* case extended the rule to cover even the situation in which the administrative agency did not believe it had power over the agreements alleged in the antitrust complaint and had requested the Attorney General to bring the complaint. Notably also, the District Court in the *Pan American* case refused to dismiss the antitrust complaint and found a violation of the antitrust laws. In the instant case, there is a strong question whether the alleged Agreement need be filed or whether it was already covered by Agreement 8200. There is no question that it may properly be approved by the Commission. The administrative agency intervened in the antitrust action to support the motion to dismiss, and the District Court, after lenthy argument and memoranda were considered, granted the motion.

23. By contrast, the nature of administrative authority was far more limited in cases holding there should be no primary jurisdiction in the administrative agency. In *California v. Federal Power Comm'n*, 369 U.S. 482, 8 L.ed. 2d 54 (1962) the Commission's authority was limited to a finding of public convenience and necessity; it was not specifically concerned with the subject matter of the antitrust laws.

In *United States v. Radio Corp. of America*, 358 U.S. 334, 3 L.ed. 2d 354 (1959) the administrative authority was similiar. The Court contrasted the limited regulatory scheme and absence of administratively supervised rate structures with the shipping industry, citing the *Cunard* and *Far East* cases (358 U.S. at 347, 3 L.ed. 2d at 363).

In *Silver v. New York Stock Exchange*, 373 U.S. 341, 358-59, 10 L.ed. 2d 389, 401 (1963) the Court noted: "By providing no

(3) An agreement not to disclose to shippers information regarding rate changes or rate requests (R. 16-17).

(4) An agreement that respondent PWC would pretend to set rates itself that had been jointly agreed upon (R. 17).

(5) An agreement that PWC would make no rate changes without concurrence of FEC (R. 17).

(6) An agreement to establish a "list of initiative items" permitting the Conference with the initiative to set rates without the concurrence of the other conference. The list did not include evaporated milk until May, 1961 (R. 17-18).

(7) An agreement that the rate on evaporated milk from the Pacific Coast to the Philippines would be increased by $2.50 per ton (R. 18-19).

(8) An agreement that respondent PWC "pretending to act agreeably to the provisions of said Agreement No. 57" would state and circulate the $2.50 increase (R. 19).

(9) That respondent PWC in fact so announced, circulated, and charged this rate as agreed (R. 19).

(10) Respondent PWC acting pursuant to its agreement with FEC refused to grant a reduction of $2.50 per ton requested by Carnation in the rate for evaporated milk (R. 20).

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agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to 'the influences of . . . [improper collective action] over which the Commission has no authority . . .' "

In *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 351-53, 10 L.ed. 2d 915, 937-39 (1963), administrative powers under the Bank Merger Act did not extend to matters covered by the antitrust laws. The Court contrasted the *Pan American* case and the *Far East* case as areas in which the primary jurisdiction doctrine properly applied.

Whether these agreements in fact exist, their meaning, their coverage by agreements already on file with the Commission, their legality under various provisions of the Shipping Act, whether they should be approved or modified, and the consequences of any interim failure to comply with the Act are all Shipping Act questions within the responsibility of the Commission; all are "precise ingredients" of the Commission's authority. The Commission has full powers to consider them and to apply the Shipping Act to them. If the agreements alleged exist and also violate the standards set up by Congress the Commission has full power to take appropriate action with respect to the violation. Accordingly, under the tests of *Cunard, Far East* and *Pan American,* the antitrust laws are superseded with respect to the agreements alleged. The nature of the remedy pleaded in an antitrust complaint cannot defeat this principle laid down by the Court.

D. The Complaint Raises Issues Requiring Prior Resort to a Specialized and Expert Administrative Agency.

In the *Far East* case, the Court carefully elaborated the primary jurisdiction doctrine, which it characterized as "firmly established":

> ". . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circum-

> stances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."
>
> (*Far East Conference v. United States*, 342 U.S. 570, 574-75; 95 L. ed. 576, 582 (1952).

In affirming dismissal of an antitrust complaint that also alleged the carrying out of an unapproved Section 15 agreement in violation of the Shipping Act, the Court concluded that "initial submission to the Federal Maritime Board is required" (*Ibid* at 576; 96 L. ed. 583).[24]

Petitioner asserts that this rule is inapplicable because "the only possible questions are of law" and "there is no action which the Commission could take which would give it [the conduct alleged] legality" (Petition, p. 36). The *Far East* and *Cunard* cases themselves reject petitioner's assertion. Those cases involved an agreement to establish a dual rate system under which shippers binding themselves to use only conference vessels paid lower rates than other shippers. One is hard put to find purely factual questions in these cases, though there are Shipping Act questions of policy and law. The Court held that the Commission must first decide the Shipping Act questions. *Federal Maritime Bd. v. Isbrandtsen Co.* (356 U.S. 481 at 497-98, 2 L. ed. 2d 926 at 937-38 (1958)) emphasizes that this is the holding of those cases.

The several agreements charged in petitioner's complaint pose factual and Shipping Act policy questions that are

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24. The *Far East* and *Cunard* cases, among others, have already determined that the Federal Maritime Commission is, as the Court of Appeals characterized it: a body specializing in and thoroughly familiar with ocean transportation, rates, agreements, practices, and shipping conditions (R. 101, 109-10, 115, 118). The Court there found these considerations particularly pertinent to the very questions presented in the instant case (R. 115, 118).

more complex and extensive than those in *Cunard* and *Far East*. Accordingly, their consideration by the Commission is even more imperative than was that consideration in *Cunard* and *Far East*. Furthermore, as in those cases, if the Commission should determine that the alleged agreements here need not be filed under Section 15 because already covered by Commission approved Agreements Nos. 57 and 8200, the agreements are specifically exempted by Section 15 from the antitrust laws, and no penalties would attach under the Shipping Act. This then clearly is "action the Commission could take which would give . . . legality" to charges made in the complaint.

But the basic question whether the alleged agreements fall within the scope of Agreements 57 and 8200 is not the only one that the Commission must decide. It is for the Commission to determine: (1) Whether the alleged agreements were in fact made. (2) What were the specific contents of those agreements if they were made? (3) Whether, if not included within Agreements 57 and 8200 the alleged agreements should be approved, with or without modification. (4) Whether, if not included within Agreements 57 and 8200, the alleged agreements violated other provisions of the Act than the filing requirements of Section 15. (5) The extent of reparations, if any, to award to persons injured by any violation found.

The principal Shipping Act question posed by the several agreements charged in petitioner's complaint is one that the Commission has pondered and interpreted since the early days of its existence. The complaint alleges that after approval of Agreement 8200 the parties held a meeting at which ten or more alleged agreements regarding procedures for fixing rates were made. These allegedly were outside of the approved agreement (R. 16-18).

But Agreement 8200 as approved by the Commission expressly calls for an "initial meeting" at which such rules shall be made including "the provision of the machinery for the change of any rates, rules and regulations." Are the procedures allegedly adopted at the "Santa Barbara meeting" authorized by Agreement 8200? To what extent may parties to an approved agreement adopt procedures implementing the approved agreement without further approval? Regarding unfiled agreements questionably subject to filing, how severely should a carrier be treated if it is later determined that an agreement should have been, but was not, filed? These knotty problems are central to the entire scheme of regulation of the shipping industry and are the first concern of the Commission which must enforce the Shipping Act.[25]

Standards regarding the extent to which a basic agreement covers subsidiary or routine matters or implementing agreements must be uniform for the whole industry and not vary with every case, as would result if antitrust suits bringing particular agreements into question were entertained. This uniformity is best obtained by submitting the question to the Commission. This was the result reached by the Court of Appeals and the District Court in the instant case and required by the Supreme Court in the *Cunard* and *Far East* cases.

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25. By way of example, the statute states that *every* agreement must be filed. But the Commission with its expertise recognized that a too liberal interpretation of the word "every" would deluge the Commission with routine matters merely implementing basic agreements. In *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927) the Commission determined that "routine" matters carrying out a basic agreement need not be filed. What is or is not a routine agreement or amendment to an agreement has proven to be a most taxing question, requiring the expertise of persons thoroughly familiar with the industry.

Other questions requiring the need for uniform treatment are here involved. The complaint charged an agreement not to disclose to shippers how Conference members voted on rate requests at meetings (R. 16-17). Significantly, the question of disclosure of the voting on such Conference matters is currently the subject of a proposed rule being considered by the Commission, although the proposed rule, for excellent reasons, does not go so far as to require disclosure of the votes of individual carriers.[26] Manifestly, this question is one for the agency regulating the industry and not one for a court dealing primarily with the anti-trust aspect of the matter.

The charge that Conference members agreed that no changes in rates would be made without concurrence of both Conferences (R. 17) raises, as the Court of Appeals recognized (R. 115), the question whether this alleged agreement falls within the approved provision in Agreement 8200 which states that the parties "shall establish the rates to be charged . . . from time to time, and the rules and regulations governing the application of said rates" and they shall take certain action only by concurrence of the two Conferences. (See R. 48-49). This is a question for the Commission in the first instance. Similarly, the charge in the complaint that the Pacific Westbound Conference agreed to pretend falsely to act under Agreement 57, its basic agreement, in announcing rates, presents a question initially for the Commission.

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26. Docket 1194—(The Proposed Rules are set forth in the Federal Register of August 6, 1964, p. 11384). As the Court of Appeals pointed out (R. 115) such disclosure would be "likely to result in the shippers granting their preferences in shipments to carriers who voted for rate reduction." This, in turn, would place intense pressures on the delicately balanced rate pattern in the industry and likely result in preferential treatment of powerful shippers despite the proscriptions of the Act.

As the Court of Appeals properly found with respect to these and other charges in the complaint: "these matters presented questions of fact and policy properly for the specialized competence of the Commission" (R. 118). The court, therefore, affirmed the dismissal of the complaint under the authority of the *Cunard* and *Far East* cases.

The fact is the Commission is currently considering the precise issues of fact, policy and law under the Shipping Act that are pleaded in the complaint. Before petitioner brought the complaint in the instant case the Commission initiated an investigation into Agreement 8200 to determine whether it was a true and complete memorandum of the agreement between the parties to it. As the Court of Appeals pointed out: "The issues presented at this hearing by Carnation [petitioner] and others included in general the same matters and claims set forth in Carnation's complaint in this case" (R. 95-96). Petitioner participated in the administrative hearing but chose to bring suit for treble damages under the antitrust laws although it could have sought reparations under the Shipping Act (Petition, p. 19, n. 30).

The Commission at the time petitioner's complaint was dismissed had not and still has not finally determined whether all or any of the agreements alleged fell within the scope of approved Agreements 57 and 8200. In an Initial Decision in the investigatory proceeding, however, the Examiner concluded (contrary to the complaint's charge that agreement of the two Conferences to concur on rates was outside the scope of the approved agreements) that the agreement to concur *is* authorized by Agreement 8200. The Examiner found other agreements to be outside the scope of Agreement 8200, but recommended that these be approved with modifications (see Agreement No. 8200, Docket 872, 2 Shipping Regulation Reports (Pike & Fischer)

900 (1963); the Examiner's opinion was issued in mimeographed form by the Commission. Aug. 30, 1963).

Should any or all of the alleged agreements be found by the Commission (1) not to have been made, or (2) made but included within the scope of approved Agreements 57 or 8200, it would be anomalous that a court could have imposed treble damages in the meantime (see *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 309, 9 L. ed. 2d 325, 335 (1963)). Even more serious, a true collision of regimes would occur in that a court by deciding both the existence of the alleged agreements and their coverage under Agreements 57 and 8200 would have determined the very Shipping Act questions that the Commission is charged with enforcing.

E. The Pervasive Regulatory Scheme of the Shipping Act Is Inconsistent With Allowance of Any Antitrust Actions.

With the possible exception of the Interstate Commerce Act, we are satisfied there is no regulatory statute that is fully comparable to the Shipping Act in its provision for supervised agreement on rates, in its provision for policing unfair competitive practices, in its sanctions for violation of substantive provisions, and in its provision for relief to those injured by violation of the Act. The Circuit Court's summary of Shipping Act regulations, as the decision itself observes, "discloses the extremely broad range of regulatory powers" (R. 104). The provisions of the Act and particularly Section 15, which is the cornerstone of the regulatory scheme, confirm the comprehensive or pervasive nature of the Act noted by the Court in the *Cunard* case.[27]

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27. "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land." (284 U.S. at 480, 76 L.ed. at 412).

The Shipping Act represents the decision of Congress that maintenance of stable rate patterns in the shipping industry by intercarrier agreement and subject to governmental supervision and control was in the national interest and that application of the antitrust laws to the industry would injure that interest (*Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 489-90, 2 L.ed. 2d 926, 933 (1958)). Accordingly, Congress created an entire regime based on economic and regulatory postulates inconsistent with the antitrust laws. The Shipping Act provides its own standards of economic behavior and its own penalties and remedies upon violation of those standards.

Upon finding such a regulatory scheme, the Court has consistently applied the doctrine of primary jurisdiction to protect the integrity of the regulatory scheme without regard to whether the antitrust remedy asserted is for damages or for injunctive relief. (See *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 67 L.ed. 183 (1922) (treble damage action superseded by remedies of Interstate Commerce Act); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 9 L.ed. 2d 325 (1963) (injunctive relief superseded by Federal Aviation Act); *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L.ed. 408 (1932) (injunctive relief superseded by Shipping Act remedies)). Decisions in which the doctrine of primary jurisdiction is found inapplicable have involved industries having regulatory schemes of limited scope. (*E.g., California v. Federal Power Comm'n*, 369 U.S. 482, 8 L.ed. 2d 54 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 3 L.ed. 2d 354 (1959)).[28] In such cases there is no danger, as here, of a collision of statutory regimes founded on inconsistent principles. There is, correspondingly, no danger of defeat-

28. See n. 23 *supra*, where these cases are discussed.

ing Congressional purposes such as there is in the instant case where Congress created a Commission with full regulatory powers over the industry.

F. Dismissal Is the Only Proper Course Here.

The Court of Appeals while properly concluding that dismissal is the right course evinced some lingering doubt whether the District Court should retain jurisdiction of the case pending action by the Commission. Petitioner while never advocating such a solution hints at its possibility (Petition, pp. 25 and 37). There may be situations where that is the appropriate course, as where doubt exists that the complaint states a cause cognizable by the agency under its regulatory statute and the agency is given the opportunity in the first instance to determine its jurisdiction. But this case is one where dismissal is the only proper course.

It is unquestioned that the complaint charges matters which are *all* within the Shipping Act. The Shipping Act provides a remedy for the wrongs charged. That remedy has superseded the judicial remedy under the antitrust acts. If given the opportunity, the Commission can deal fully with each issue and claim. There is not one thing left over that could come back to a district court for disposition. The Commission's decision is, of course, fully reviewable by the courts of appeal under the Hobbs Act (5 U.S.C. §§ 1031-1042). In such a review the full record before the Commission is before the Court of Appeals (5 U.S.C. § 1037).

Hence, the *primary* or original jurisdiction is in the Commission with full opportunity for court review. Dismissal is the correct action. A recent statement on the question by the Supreme Court is determinative:

> "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See United States Nav. Co. v. Cunard

S. S. Co. 284 US 474, 76 L ed 408, 52 S Ct 247; Far East Conference v United States, 342 US 570, 577, 96 L ed 576, 583, 72 S Ct 492."

(*Pan American World Airways v. United States*, 371 U.S. 296, 312 n. 19; 9 L.ed. 2d 325, 337-38, n. 19).[29]

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29. Additional cases holding dismissal is the proper action include:

American Union Transp. v. River Plate & Brazil Conferences, 126 F. Supp. 91 (S.D. N.Y. 1954); *aff'd* 222 F.2d 369 (2d Cir., 1955);

Rivoli Trucking Corp. v. American Export Lines, 167 F. Supp. 937 (E.D. N.Y. 1958), in which the court at p. 940 gives primary jurisdiction as an alternative ground for dismissal;

Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F. Supp. 940 (S.D. N.Y. 1956); and see also

Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F. Supp. 943 (S.D. N.Y. 1957), which cites the 1956 dismissal in refusing motion for leave to file an amended and supplemental complaint;

United States v. Alaska S.S. Co., 110 F. Supp. 104 (W.D. Wash. 1952);

Wisconsin & Mich. Transp. Co. v. Pere Marquette L.S., 67 F.2d 937 (7th Cir. 1933), affirming dismissal by District Court, opinion unreported;

Swayne & Hoyt v. Kerr Gifford & Co., 14 F.Supp. 805 (E.D. La. 1935);

United States v. Borax Consolidated Ltd., 141 F.Supp. 396 (N.D. Cal. 1955).

CONCLUSION

We respectfully submit that the issues presented by the instant Petition confront the Court with no conflicts between circuits, with no new questions requiring consideration by the Court and with no questions of public importance. The issues presented have been fully settled by the *Cunard* and *Far East* cases which the Court of Appeals here correctly applied. Those cases are wholly consistent with other decisions announced by the Court on related questions under different regulatory schemes. Accordingly, the instant Petition for a Writ of Certiorari should be denied.

Dated: December 3, 1964.

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Attorneys for Respondent Pacific Westbound Conference and its member lines.

CERTIFICATE OF SERVICE OF REPLY TO PETITION FOR A WRIT OF CERTIORARI

I, Edward D. Ransom, the undersigned, certify as follows:

I am a member of the Bar of the Supreme Court of the United States and represent Pacific Westbound Conference, one of the respondents in the within case in its Reply to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on whose behalf service is hereby certified to was affected.

I certify that on December 3, 1964 I served three (3) copies of the within Reply to Petition for a Writ of Certiorari upon petitioner through its attorneys whose appearance have been entered herein and upon other parties respondent through the attorneys who have heretofore appeared for them, by mailing same first class mail at San Francisco, California, postage prepaid, as follows:

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